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YUNG ING ING v. HUNFARA CONSTRUCTION SDN BHD

COURT OF APPEAL, KUCHING
MOHD HISHAMUDIN YUNUS JCA
DAVID WONG DAK WAH JCA
UMI KALTHUM ABDUL MAJID JCA
B [CIVIL APPEAL NO: Q-02-2628-12-2013]
24 JULY 2015

C ***COMPANY LAW:*** *Director – Liabilities – Consent judgment obtained against company – Judgment sum to be paid by way of four instalments – Whole sum due in event of default of any instalment – Cheque issued in company's name by director – Cheque dishonoured when presented for payments – Whether director as officer of company liable for amount specified in cheques – Companies Act 1965, ss. 4, 121(2), 121(2)(c) – Bills of Exchange Act 1949, s. 81A*

D ***STATUTORY INTERPRETATION:*** *Construction of statutes – Intention of Parliament – Whether latter limb to s. 121(2) of Companies Act 1965 applied to cheques – Whether cheques could be construed to be included in 'negotiable instruments' – Companies Act 1965, s. 121(2)*

WORDS AND PHRASES: *'Cheque' – Companies Act 1965, s. 121(2) – Whether*
E *latter limb to s. 121(2) of Companies Act 1965 applied to cheques*

Hunfara Construction Sdn Bhd ('respondent'), commenced a civil suit ('2012 civil suit') against, amongst others, a company named YWP Builders Sdn Bhd ('YWP Builders'). On 28 March 2013, a consent judgment was obtained by the respondent against YWP Builders in the 2012 civil suit who were
F ordered to pay the respondent the sum of RM1,100,000 by way of four instalment payments. It was further ordered that in default of any instalment payment, the whole judgment sum shall immediately become due and payable. In light of the consent judgment, the appellant, on behalf of YWP Builders, issued four Public Bank Berhad ('PBB') cheques. All the said four
G cheques were post-dated cheques and crossed with the words 'A/C PAYEE ONLY'. On 24 December 2012, YWP Builders changed its name to YWP Construction Sdn Bhd ('YWP Construction'). However, the same company number of YWP Builders was retained. On 30 May 2013, the first cheque was dishonoured upon presentation for payment. Therefore, by virtue of the
H consent judgment, the whole judgment sum became due and payable. As no payments were made by neither the appellant as director of YWP Construction, nor the company, the respondent filed an originating summons ('OS') on 12 July 2013 against the appellant. The respondent claimed that the appellant was liable to the respondent for the sum of RM1,100,000 being the total amount due on the four cheques, in default of payment by the
I company pursuant to s. 121(2) of the Companies Act 1965 ('the Act'). On the contrary, the appellant argued that there was no breach of s. 121(2) of the Act since the four cheques were company cheques for YWP Builders Sdn

Bhd/YWP Construction and not the personal cheques of the appellant. The High Court allowed the respondent's OS application and ruled that pursuant to s. 4 of the Act, the appellant, being the director of YWP Construction, was an officer of the company and had signed the four cheques. In the premise, pursuant to s. 121(2)(c) of the Act, the High Court held that the appellant was liable to the respondent. Hence, the present appeal.

Held (allowing appeal with costs; setting aside order of High Court)
Per Mohd Hishamudin Yunus JCA delivering the judgment of the court:

(1) The High Court Judge had erred in allowing the respondent's claim and in assuming that s. 121(2) of the Act applied to cheques. Section 121(2)(c) of the Act had the word 'cheque' in it, apart from the words 'bill of exchange', 'promissory note' and 'other negotiable instruments'. There is a significant difference in the wording between the two limbs, unlike s. 121(2)(c) of the Act, the latter limb of s. 121(2) of the Act does not have the word 'cheque' in it. It must be ruled that s. 121(2) of the Act, although, like s. 121(2)(c) of the Act, applies to 'bills of exchange', 'promissory notes' and 'negotiable instruments', it does not, however, apply to cheques. This must be the intention of the Act. (paras 26-29)

(2) If the latter limb did not apply to cheques then the failure to state the current name of the company in each of the cheques, as a matter of law, did not entitle the respondent to claim from the appellant for payment in respect of the sums as specified in the cheques pursuant to s. 121(2) of the Act. It is a principle of interpretation of statutes that where the Legislature included a particular term in one part of the section of a statute but omits it in another part or section of the same, it must be presumed that the Legislature acted intentionally and purposely in the disparate inclusion or exclusion. (para 30)

(3) The respondent seemed to be conscious of the absence of the word 'cheque' in the latter limb of s. 121(2) of the Act and that explained its reliance on the words 'other negotiable instruments' in its written submission to justify its contention that this latter limb applied to cheques as well. Thus, the respondent assumed, *albeit* rather erroneously, that the four cheques were 'negotiable instruments'. (para 32)

(4) Even assuming that the words 'negotiable instruments' in the latter limb of s. 121(2) of the Act included cheques, it was, however, that the four cheques in law were 'not negotiable instruments'. Each of the four cheques was crossed with the words 'A/C PAYEE ONLY'. This made the cheques non-transferable pursuant to s. 81A of the Bills of Exchange Act 1949. (para 35)

(5) One of the basic attributes of a negotiable instrument is the right of the payee to transfer the instrument to another person. By crossing a cheque with the words 'account payee' the cheque becomes non-transferable. According to common law, such an instrument is then no longer a negotiable instrument but constitutes a mere contract between the parties. (para 36)

Per David Wong Dak Wah JCA:

(1) It was undisputed that when s. 121(2)(c) of the Act was enacted, it could be said that the existence and requirement of having the company's number endorsed on the cheques was not envisaged. Applying the purposive approach in constructing s. 121(2)(c) of the Act, the appellant should not be held liable as there was no deception as envisaged in s. 121(2)(c) of the Act. (para 63)

(2) One must not lose sight of the rule of *Foss v. Harbottle* which prescribed that a company was a separate and independent legal entity which could sue or be sued. Hence, in interpreting s. 121(2)(c) of the Act, this rule must be given due regard. Accordingly, the respondent did not have a cause of action under s. 121(2)(c) of the Act. (para 64)

Bahasa Malaysia *Translation Of Headnotes*

Hunfara Construction Sdn Bhd ('responden') telah memulakan guaman sivil ('guaman sivil 2012') terhadap, antara lain, sebuah syarikat yang dikenali sebagai YWP Builders Sdn Bhd ('YWP Builders'). Pada 28 Mac 2013, satu penghakiman persetujuan telah diperolehi oleh responden terhadap YWP Builders dalam guaman sivil 2012 yang memerintahkan YWP Builders membayar kepada responden sejumlah RM1,100,000 melalui empat bayaran ansuran. Adalah diperintahkan selanjutnya bahawa jika berlaku apa-apa kegagalan dalam bayaran ansuran tersebut, keseluruhan jumlah penghakiman akan menjadi terakru dan perlu dibayar dengan serta-merta. Berdasarkan penghakiman persetujuan tersebut, perayu, bagi pihak YWP Builders telah mengeluarkan empat cek Public Bank Berhad ('PBB'). Keempat-empat cek tersebut merupakan cek tarikh tertunda dan dipalangkan dengan perkataan 'A/C PAYEE ONLY'. Pada 24 Disember 2012, YWP Builders telah menukar namanya kepada YWP Construction Sdn Bhd ('YWP Construction'). Pada 30 Mei 2013, cek pertama tidak laku apabila dikemukakan untuk bayaran. Oleh itu, menurut penghakiman persetujuan tersebut, keseluruhan jumlah penghakiman terakru dan perlu dibayar. Oleh kerana tiada bayaran dibuat oleh perayu sebagai seorang pengarah YWP Construction, ataupun syarikat, responden telah memfailkan saman pemula ('OS') pada 12 Julai 2013 terhadap perayu. Responden mendakwa bahawa perayu bertanggungan kepada responden untuk membayar jumlah sebanyak RM1,100,000 yang merupakan jumlah yang perlu dibayar berdasarkan keempat-empat cek tersebut, atas kegagalan syarikat untuk membuat pembayaran menurut s. 121(2) Akta Syarikat 1965 ('Akta'). Sebaliknya,

perayu menghujahkan bahawa tiada pelanggaran s. 121(2) Akta kerana keempat-empat cek tersebut merupakan cek syarikat untuk YWP Builders Sdn Bhd/YWP Construction dan bukan cek peribadi perayu. Mahkamah Tinggi telah membenarkan permohonan OS responden dan membuat dapatan bahawa menurut s. 4 Akta, perayu, yang merupakan pengarah YWP Construction adalah seorang pegawai syarikat tersebut dan telah menandatangani keempat-empat cek tersebut. Oleh itu, menurut s. 121(2)(c) Akta, Mahkamah Tinggi memutuskan bahawa perayu bertanggungan terhadap responden. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan perintah Mahkamah Tinggi)
Oleh Mohd Hishamudin Yunus HMR menyampaikan penghakiman mahkamah:

(1) Hakim Mahkamah Tinggi telah terkhilaf dalam membenarkan tuntutan responden dan dalam menganggap s. 121(2) Akta boleh diguna pakai untuk cek. Seksyen 121(2)(c) Akta mempunyai perkataan 'cheque' di dalamnya, selain daripada perkataan 'bill of exchange', 'promissory note' dan 'other negotiable instruments'. Terdapat perbezaan yang ketara dalam perkataan antara kedua-dua cabang berikut, tidak seperti s. 121(2)(c) Akta, cabang kedua s. 121(2) Akta tidak mempunyai perkataan 'cheque' di dalamnya. Adalah perlu untuk diputuskan bahawa s. 121(2) Akta, walaupun, seperti s. 121(2)(c) Akta, digunakan untuk 'bills of exchange', 'promissory notes' dan 'negotiable instruments', ia tidak, bagaimanapun, diguna pakai kepada cek. Ini pastinya niat Akta tersebut.

(2) Jika cabang kedua tidak boleh diguna pakai kepada cek maka kegagalan untuk menyatakan nama semasa syarikat dalam setiap cek, dari segi undang-undang, tidak memberi hak kepada responden untuk menuntut daripada perayu pembayaran jumlah wang sebagaimana yang dinyatakan dalam cek-cek tersebut menurut s. 121(2) Akta. Adalah prinsip pentafsiran statut bahawa apabila perundangan memasukkan terma tertentu dalam satu bahagian seksyen dalam sesuatu statut tetapi meninggalkannya dalam bahagian yang lain atau seksyen dalam statut yang sama, harus dianggap bahawa perundangan telah melakukannya dengan sengaja dan dengan niat membezakan kemasukan atau pengecualian tersebut.

(3) Responden seolah-olah sedar ketiadaan perkataan 'cheque' dalam cabang terkemudian kepada s. 121(2) Akta dan perkara tersebut menjelaskan pergantungannya kepada perkataan 'other negotiable instruments' dalam hujahan bertulis responden untuk menjustifikasikan penghujahan bahawa cabang terkemudian boleh diguna pakai untuk cek-cek juga. Oleh itu, responden telah mengandaikan, meskipun agak tersilap, bahawa keempat-empat cek tersebut adalah 'negotiable instruments'.

A **(4)** Mengandaikan bahawa perkataan 'negotiable instruments' dalam cabang kedua s. 121(2) Akta merangkumi cek, adalah, bagaimanapun, bahawa keempat-empat cek tersebut dari segi undang-undang adalah 'not negotiable instruments'. Keempat-empat cek tersebut telah dipalangkan dengan perkataan 'A/C PAYEE ONLY'. Ini menjadikan cek-cek
B tersebut tidak boleh dipindah milik menurut peruntukan s. 81A Akta Bil Pertukaran 1949.

(5) Salah satu ciri asas 'negotiable instrument' adalah hak penerima untuk memindahkan surat cara tersebut kepada orang lain. Dengan memalang cek dengan perkataan 'Account Payee' cek tersebut menjadikannya tidak
C boleh dipindah milik. Menurut common law, instrumen seperti itu bukan lagi satu surat cara 'negotiable instrument' tetapi merupakan satu kontrak semata-mata di antara pihak-pihak.

Oleh David Wong Dak Wah HMR:

D **(1)** Tidak boleh dipertikaikan bahawa apabila s. 121(2)(c) Akta digubal, ia boleh dikatakan bahawa kewujudan dan keperluan untuk memperoleh nombor syarikat disahkan pada cek tidak dijangkakan. Menggunakan pendekatan purposif dalam mentafsir s. 121(2)(c) Akta, perayu tidak bertanggungan kerana tiada penipuan yang dijangkakan dalam
E s. 121(2)(c) Akta.

(2) Seorang tidak boleh hilang fokus terhadap peraturan *Foss v. Harbottle* yang menetapkan bahawa syarikat adalah entiti undang-undang berasingan dan bebas yang boleh disaman atau menyaman. Oleh itu, dalam mentafsirkan s. 121(2)(c) Akta, peraturan ini perlu diberi
F perhatian yang sewajarnya. Oleh itu, responden tidak mempunyai kausa tindakan di bawah s. 121(2)(c) Akta tersebut.

Case(s) referred to:

Atkin and Co v. Wardle and Others [1889] The Law Times Vol LXI, 23 ***(refd)***

Banque de I'Indochine et de Suez SA v. Euroseas Group Finance Co Ltd and Others [1981]
G *3 All ER 198* ***(refd)***

F Stacey and Co (Limited) v. Wallis and Others [1912] 106 LT 544 ***(refd)***

F Stacey and Co (Limited) v. Wallis and Others [1912] 28 LT 209 ***(refd)***

Penrose v. Martyr (EB and E, 499), Atkin and Co v. Wardle And Others LXI LT 23 ***(refd)***

H **Legislation referred to:**

Bills of Exchange Act 1949, s. 81A

Civil Law Act 1956, s. 3

Companies Act 1965, ss. 4, 121(2)(c)

Interpretation Acts 1948 and 1967, s. 17A

Companies Act 1862 [UK], ss. 41, 42

I Companies Act 1908 [UK], s. 63

Other source(s) referred to:
Bennion on Statutory Interpretation, 5th edn, pp 1157, 1160
Poh Chu Chai, *Law of Negotiable Instruments*, 5th edn, p 6

For the appellant - Alvin Yong (Shirleen Ong with him); M/s Chong Brothers Advocs
For the respondent - Jacquelyn Hii (Zal Hii Sing Tieng with her); M/s Spring Advocs

[Appeal from High Court Sabah & Sarawak, Kuching; Originating Summons No: KCH-24-113-7-2013]

[Editor's note: This judgment was reported in Yung Ing Ing v. Hunfara Construction Sdn Bhd [2015] 7 CLJ 438 without the concurring decision. The complete judgment is reproduced herewith]

Reported by Sandra Gabriel

JUDGMENT

Mohd Hishamudin Yunus JCA:

Introduction

[1] This is an appeal against the decision of the High Court of Sabah and Sarawak at Kuching delivered on 25 October 2013.

[2] The learned High Court Judge, upon hearing the respondent's originating summons application, had granted the following declaration and order:

(a) that for the purpose of s. 121(2) of the Companies Act 1965 the defendant (the appellant in this appeal) be declared as the officer of YWP Construction Sdn Bhd ("the company" - formerly known as "YWP Builders Sdn Bhd") that signed or issued the following four cheques:

(i) Public Bank Berhad ("PBB") cheque No. 277319 dated 30 May 2013 for the sum of RM100,000 ("the first cheque");

(ii) PBB cheque No. 277320 dated 30 June 2013 for the sum of RM330,000 ("the second cheque");

(iii) PBB Cheque No. 277321 dated 30 July 2013 for the sum of RM330,000 ("the third cheque"); and

(iv) PBB cheque No. 277322 dated 30 August 2013 for the sum of RM340,000 ("the fourth cheque");

where in each of the four cheques the current name of the company is not mentioned. (In this judgment I shall be referring to these four cheques collectively as "the four cheques".)

(b) that pursuant to s. 121(2) of the Companies Act 1965 ("the Companies Act"), the defendant do pay the plaintiff the sum of RM1,100,000.

[3] The above declaration and order are made in accordance with the prayers sought for in the originating summons.

[4] This case involves an interpretation of s. 121(2) of the Companies Act. Section 121 provides:

> Publication of name
>
> 121. (1) The name of the company (whether or not it is carrying on business under a business name) in legible romanised letters and the company number of the company shall appear on:
>
> (a) its seal; and
>
> (b) all business letters, statements of account, invoices, official notices, publications, bills of exchange, promissory notes, endorsements, cheques, orders, receipts and letters of credit of or purporting to be issued or signed by or on behalf of, the company,
>
> and if default is made in complying with this subsection the company shall be guilty of an offence against this Act.
>
> (1A) Where a company has changed its name pursuant to section 23, the former name of the company shall also appear beneath its present name on all documents, business letters, statements of account, invoices, official notices, publications, bills of exchange, promissory notes, endorsements, cheques, orders, receipts and letters of credit of, or purporting to be issued or signed by or on behalf of, the company for a period of not less than twelve months from the date of the change, and if default is made in complying with this subsection the company shall be guilty of an offence against this Act.
>
> (2) If an officer of a company or any person on its behalf:
>
> (a) uses or authorises the use of any seal purporting to be a seal of the company whereon its name does not so appear;
>
> (b) issues or authorises the issue of any business letter, statement of account, invoice, official notice or publication of the company wherein its name and former name (if applicable) is not so mentioned; or
>
> (c) signs issues or authorises to be signed or issued on behalf of the company any bill of exchange, promissory note, cheque or other negotiable instrument or any endorsement, order, receipt or letter of credit wherein its name and former name (if applicable) is not so mentioned,
>
> he shall be guilty of an offence against this Act, and where he has signed, issued or authorised to be signed or issued on behalf of the company any bill of exchange, promissory note or other negotiable instrument or any endorsement thereon or order wherein that name and former name (if applicable) is not so mentioned, he shall in addition be liable to the holder of the instrument or order for the amount due thereon unless it is paid by the company.

[5] We heard the appeal on 16 April 2015. We reserved judgment. We announced that the court will deliver its judgment on 24 July 2015.

[6] This is my judgment.

The Facts Of The Case

[7] In the year 2012, the plaintiff (Hunfara Construction Sdn Bhd) commenced a civil suit ("the 2012 civil suit") against a company called "YWP Builders Sdn Bhd" in the High Court of Sabah and Sarawak at Kuching (there are other defendants as well in that 2012 civil suit but we are not concerned with them for the purpose of this appeal). It is not stated in the cause papers of the present originating summons as to the cause of action in that 2012 civil suit.

[8] Be that as it may, on 28 March 2013 a consent judgment was obtained by the plaintiff against YWP Builders Sdn Bhd and one other defendant (of that 2012 civil suit) who were jointly and severally ordered to pay the plaintiff the sum of RM1,100,000 by way of four instalment payments. (It is further ordered that in default of any instalment payment, the whole judgment sum shall immediately become due and payable.)

[9] In the light of the consent judgment, YWP Builders Sdn Bhd issued the four cheques as mentioned earlier.

[10] It is not disputed that the defendant (Yung Ing Ing) when she issued the four cheques was a director of the YWP Construction Sdn Bhd and is an officer of the company by virtue of the definition of "officer" in s. 4 of the Companies Act.

[11] All the four cheques are post-dated cheques.

[12] Each of the four cheques is crossed with the words "A/C Payee Only".

[13] On 30 May 2013, the first cheque was dishonoured upon presentation for payment. (By virtue of the consent judgment, the whole judgment sum became due and payable with interest at the prescribed rate.)

[14] On 24 December 2012, YWP Builders Sdn Bhd changed its name to "YWP Construction Sdn Bhd". The company number for YWP Builders Sdn Bhd was 761221-D. When YWP Builders Sdn Bhd changed its name to "YWP Construction Sdn Bhd" it retains the same company number. In other words, the company number for YWP Construction Sdn Bhd is still 761221-D.

[15] However, the new name "YWP Construction Sdn Bhd" is not mentioned on any of the four cheques. But the previous name of the company, that is, "YWP Builders Sdn Bhd" is mentioned. The company number for "YWP Builders Sdn Bhd", that is, 761221-D, is also stated in each of the four cheques, next to the company's name.

[16] The name of the company when the 2012 civil suit was commenced was "YWP Builders Sdn Bhd" and the consent judgment was made in that name.

[17] To-date, neither the defendant nor the company has made any payment for the sum due under the consent judgment despite the company and the defendant having received the letter of demand dated 7 June 2013.

[18] The originating summons was filed on 12 July 2013. At the time of the filing of the originating summons only the first and second cheques (dated 30 May 2013 and 30 June 2013, respectively) were due for payment. The third and fourth cheques were not.

[19] Except for the first cheque, the other three cheques were never presented to the bank for payment.

The Plaintiff's Submission

[20] It is the contention of the plaintiff that pursuant to s. 121(2) of the Companies Act, the defendant is liable to the plaintiff for the sum of RM1,100,000 being the total "amount due" on the four cheques, in default of payment by the company.

[21] It is the further contention that the word "negotiable instrument" in that limb of s. 121(2) (the limb after limb (c)) that states:

> and where he has signed, issued or authorised to be signed or issued on behalf of the company any bill of exchange, promissory note or other negotiable instrument or any endorsement thereon or order wherein that name and former name (if applicable) is not so mentioned, he shall in addition be liable to the holder of the instrument or order for the amount due thereon unless it is paid by the company.

includes cheques.

The Defendant's Submission

[22] It is the contention of the defendant that there was no breach of s. 121(2) of the Companies Act since the former name of the company (that is to say, "YWP Builders Sdn Bhd") and the company number "761221-D" (which is also the same company number for YWP Construction Sdn Bhd) are stated on each of the four cheques. Thus, there was no intention to deceive anyone and it is clear to anyone receiving the four cheques that they were company cheques for "YWP Builders Sdn Bhd"/"YWP Construction Sdn Bhd", and not the personal cheques of the defendant. It is argued that in interpreting s. 121(2) of the Companies Act the court must adopt a purposive approach, citing the following English cases:

(i) *F Stacy and Co (Limited) v. Wallis and Others* [1912] 106 LT 544;

(ii) *Atkin and Co v. Wardle and Others* [1889] The Law Times Vol LXI, 23; and

(iii) *Banque de I'Indochine et de Suez SA v. Euroseas Group Finance Co Ltd and Others* [1981] 3 All ER 198.

[23] It is the further submission of the defendant that the plaintiff's claim in respect of the third and fourth cheques is premature as at the time of the filing of the originating summons (12 July 2013) these two post-dated cheques were not yet due for payment and were never presented to the bank.

Decision Of The High Court

[24] At the High Court of Kuching the learned judge allowed the plaintiff's originating summons application. The learned judge ruled:

> 20. It is plain and obvious that pursuant to section 4 of the Companies Act, the Defendant, being the director of the YWP Construction Sdn Bhd, is an officer of the company. It is not in dispute that the Defendant has signed the four cheques in question and as of today, the company has not paid the money due to the Plaintiff under the Consent Judgment despite the Defendant having received the letter of demand [Exhibit LTP-5]. In the premise, pursuant to section 121(2)(c) of the Companies Act, the Defendant shall be liable to the Plaintiff for the sum of RM1,100,000.00 being the amount due on the four post-dated cheques.

[25] The learned High Court Judge, in her grounds of judgment, did not embark upon any analysis of the provisions of s. 121 of the Companies Act.

My Decision

[26] In my judgment, the learned High Court Judge, with respect, erred in allowing the plaintiff's claim and in assuming that the limb in question of sub-s. (2) of s. 121 of the Companies Act applies to cheques.

[27] It is important to note that limb (c) of sub-s. (2) of s. 121 of the Companies Act has the word "cheque" in it, apart from the words "bill of exchange", "promissory note" and "other negotiable instrument". Section 121(2) limb (c) reads:

> (c) signs issues or authorises to be signed or issued on behalf of the company any bill of exchange, promissory note, **cheque** or other negotiable instrument or any endorsement, order, receipt or letter of credit wherein its name and former name (if applicable) is not so mentioned, (emphasis added)

[28] And it is also pertinent to note that that limb of s. 121 (2) following limb (c) of sub-s. (2) of s. 121, whilst, like limb (c) of sub-s. (2) of s. 121, it has the words "bill of exchange", "promissory note" and "other negotiable instrument" in it, yet there is a significant difference in the wording between the two limbs: for, unlike limb (c) of sub-s. (2) of s. 121, this latter limb of s. 121(2) does not have the word "cheque" in it. It merely reads:

> … and where he has signed, issued or authorised to be signed or issued on behalf of the company any bill of exchange, promissory note or other negotiable instrument or any endorsement thereon or order wherein that

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> name and former name (if applicable) is not so mentioned, he shall in addition be liable to the holder of the instrument or order for the amount due thereon unless it is paid by the company …

[29] This being the scheme of the drafting of the provision, in my judgment, it must be ruled that this particular (or latter) limb of sub-s. (2) of
B s. 121, although, like limb (c) of sub-s. (2), it applies to bills of exchange, promissory notes and negotiable instruments, it does not, however, apply to cheques. This must be the intention of the Act; for, otherwise, why is it that limb (c) of sub-s. (2) of s. 121 has the word "cheque" in it (besides the words "bill of exchange", "promissory note" and "other negotiable instrument"),
C yet the word "cheque" was omitted from the subsequent (or latter) limb of sub-s. (2) of that section, whilst references to "bill of exchange", "promissory note" and "other negotiable instrument" were retained? If the latter limb does not apply to cheques then the failure to state the current name of the company in each of the four cheques, as a matter of law, does not entitle the
D plaintiff to claim from the defendant for payment in respect of the sums as specified in the cheques pursuant to s. 121(2) of the Companies Act.

[30] In my judgment it is a principle of interpretation of statutes that where the Legislature includes a particular term in one part or section of a statute but omits it in another part or section of the same, it must be presumed that
E the Legislature acts intentionally and purposely in the disparate inclusion or exclusion. There are the principles of construction as pointed out by *Bennion on Statutory Interpretation* (5th edn. at pp. 1157, 1160):

> Construction as a whole requires that, unless the contrary appears, three principles should be applied. These are that every word in the Act should
F be given a meaning, the same word should be given the same meaning, and different words should be given different meanings.
>
> Every word to be given meaning On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment. It is presumed that if a word or phrase appears, it was put there for a purpose and must not be disregarded.
G
> …
>
> Different words to be given different meanings Similarly it is presumed that the drafter did not indulge in elegant variation, but kept to a particular term when wishing to convey a particular meaning …

H **[31]** Therefore, the inclusion of the word "cheque" in limb (c) of sub-s. (2) of s. 121 and the exclusion of the word "cheque" in the latter limb of that sub-section was done intentionally and purposely by Parliament; and the court must give effect to the intention of Parliament: that whilst the former limb (limb (c)) applies to cheques, the latter (subsequent) limb does not.

I **[32]** It appears to me that the plaintiff seems to be conscious of the absence of the word "cheque" in the later limb of sub-s. (2) of s. 121; and that explains its reliance on the words "other negotiable instruments" in its

written submission to justify its contention that this latter limb applies to cheques as well. The plaintiff assumes, *albeit* rather erroneously, that the four cheques are 'negotiable instruments'.

[33] The defendant, however, in her written submission, unfortunately, appears to be oblivious to the absence of the word "cheque" in the latter limb of the sub-section. But assuming that the defendant (or her learned counsel) was in fact conscious of the omission of the word "cheque" in the latter limb of the sub-section in question, it is rather puzzling that she (or her counsel) could have overlooked the fact that such an omission does have an important implication in terms of statutory interpretation - an implication that would be to the defendant's favour.

[34] The learned High Court Judge, as I have pointed out earlier, also did not touch on this issue (that is, on the omission of the word "cheque") in her grounds of judgment.

Whether The Four Cheques Are Negotiable Instruments

[35] In any event, even assuming for the moment that the words "negotiable instruments" in the latter limb of sub-s. (2) of s. 121 include cheques, as contended by the plaintiff, it is, however, my view that in the present case the four cheques, in law, are not negotiable instruments. It is true that cheques, like bills of exchange and promissory notes, are forms of negotiable instruments. However, in the present case, each of the four cheques is crossed with the words "A/C Payee Only". This makes the cheques non-transferrable. Section 81A of the Bills of Exchange Act 1949 ("the Bills of Exchange Act") provides:

> Non-transferable cheque
>
> 81A. (1) Where a cheque is crossed and bears across its face the words 'account payee' or 'a/c payee', either with or without the word 'only', the cheque shall not be transferable, but shall only be valid as between the parties thereto.

[36] Now, one of the basic attributes of a negotiable instrument is the right of the payee to transfer the instrument to another person. In Poh Chu Chai on *Law Of Negotiable Instruments,* 5th edn, at p. 6, the learned author enlightens us on the law governing negotiable instruments as follows:

> A negotiable instrument generally possesses three main characteristics. First, the instrument is freely transferable. Secondly, a transferee of the instrument is entitled to sue on the instrument in his own name. Thirdly, the instrument enables a *bona fide* transferee for value of the instrument to acquire a title to the instrument better than the person who transferred the instrument to him. This body of customary usages and practices forms what is now known as the law merchant. The common law eventually had to give its recognition to these customary practices and the law merchant has since been assimilated as part of the common law.

[37] The common law of England continues to apply in Malaysia by virtue of s. 3 of the Civil Law Act 1956.

[38] By crossing a cheque with the words "Account Payee" the cheque becomes non-transferable meaning that the right of the payee to transfer the instrument is taken away by the instrument. According to the common law, such an instrument is then no longer a negotiable instrument but constitutes a mere contract between the parties (see Poh Chu Chai on *Law Of Negotiable Instruments,* 5th edn. at p. 384).

Conclusion

[39] In the light of the reasons as given the above, I am allowing the appeal with costs of RM10,000 to the appellant/defendant for here and below. The order of the High Court is set aside; and the deposit refunded to the appellant/defendant.

[40] Appeal allowed with costs of RM10,000 to appellant/defendant for here and below; deposit refunded to appellant/defendant.

[40A] Umi Kalthum JCA has read this judgment and agrees with it.

David Wong Dak Wah JCA:

Introduction

[41] This is an appeal by the appellant against the decision of the High Court in which the learned judge found the appellant personally liable for four cheques amounting to RM1,100,000 issued to the respondent on behalf of a company.

[42] On 16 April 2015, we heard the appeal and reserved judgment to 24 July 2015. I now give my grounds and decision.

Background Facts

[43] The factual matrix is fairly straightforward. They are undisputed and are as set out in both the submissions of counsel for the appellant and respondent which I adopt with the appropriate amendments.

[44] YWP Builders Sdn Bhd changed its name to YWP Construction Sdn Bhd on 12 July 2013.

[45] The appellant was at the material time a director of YWP Construction Sdn Bhd.

[46] On 28 March 2013, a consent judgment under Suit No. KCH-22-11/1-2012 was obtained by the respondent against YWP Builders Sdn Bhd and Yung Wei Pong in which YWP Builders Sdn Bhd and Yung Wei Pong were ordered to jointly and severally pay the sum of RM1,100,000 by four instalments. It was also ordered that in default of any instalment payment, the whole remaining judgment sum shall be immediately due and payable together with interest at 5% per annum.

[47] Pursuant to the consent judgment, YWP Builders Sdn Bhd issued four cheques to the respondent wherein the name of the company stated in the cheques remained as YWP Builders Sdn Bhd as opposed to the new name YWP Construction Sdn Bhd.

[48] The four cheques were for the following sums:

(a) PBB 277319 dated 30 May 2013 for the sum of RM100,000;

(b) PBB 277320 dated 30 June 2013 for the sum of RM330,000;

(c) PBB 277321 dated 30 July 2013 for the sum of RM330,000; and

(d) PBB 277322 dated 30 August 2013 for the sum of RM340,000.

[49] The company number for YWP Builders Sdn Bhd and YWP Construction Sdn Bhd is the same which is 761221-D. The reason is simply that in situation involving only in a change of a company's name the company number remains.

[50] The name of the company when Suit No. KCH-22-11/1-2012 was commenced was YWP Builders Sdn Bhd and the consent judgment was made in the name of YWP Builders Sdn Bhd.

[51] The cheques issued by YWP Builders Sdn Bhd each bear the name of "YWP Builders Sdn Bhd" and the aforesaid company number.

[52] As holder of the four post-dated cheques, the respondent filed in an application for an order that the appellant be made personally liable for the four post-dated cheques premised on s. 121(2)(c) of the Companies Act 1965.

High Court Decision And Grounds

[53] The learned judge sustained the respondent's application premised on her construction of s. 121(2)(c) of the Companies Act which reads as follows:

> If an officer of a company ... signs, issues or authorises to be signed or issued on behalf of the company any ... cheque or other negotiable instrument ... wherein its name and former name (if applicable) is not so mentioned, he shall be guilty of an offence against this Act, and where he has signed, issued or authorised to be signed or issued on behalf of the company any ... negotiable instrument ... wherein that name and former name (if applicable) is not so mentioned, he shall in addition be liable to the holder of the instrument or order for the amount due thereon unless it is paid by the company.

[54] The learned judge held that the aforesaid provision applies to the factual matrix before her and the rationale in her words is as follows:

> 17. The language employed in section 121(2)(c) Companies Act, as rightly submitted by counsel for the Plaintiff, is plain and obvious. It vividly states that the cause of action for personal liability of the cheque signatory arises when the following elements are satisfied:
>
> (a) The cheque wherein its name and former name of the company is not so mentioned has been signed.

A (b) The cheque was signed by an officer of a company.

(c) The company has not paid for the amount due on the cheque.

18. The Defendant has not shown what is the other meaning of section 121(2)(c) of the Companies Act.

B 19. Given that the language in section 121(2)(c) of the Companies Act is plain and obvious, on the high authority of *All Malayan Estate Staff Union* case cited in *Andrew Lee Siew Ling, supra*, the purposive approach as contended by the Defendant has no application in the present case.

20. It is plain and obvious that pursuant to section 4 of the Companies Act, the Defendant, being the director of the YWP Construction Sdn C Bhd, is an officer of the company. It is not in dispute that the Defendant has signed the four cheques in question and as of today, the company has not paid the money due to the Plaintiff under the Consent Judgment despite the Defendant having received the letter of demand [Exhibit LTP-5]. In the premise, pursuant to section 121(2)(c) of the Companies Act, the D Defendant shall be liable to the Plaintiff for the sum of RM1,100,000.00 being the amount due on the four post-dated cheques.

Grounds Of Decision

[55] It is conceded by counsel for the appellant that the three elements listed above have been satisfied if the learned judge's construction of E s. 121(2)(c) is upheld. However, learned counsel urges the court to adopt a construction reflecting the time we live in now.

[56] In construing any statute, the starting point in my view is s. 17A of the Interpretation Acts 1948 and 1967 which provides as follows:

F In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object

[57] It can be said then s. 17A dictates that the court should first look for G the purpose or object of the statute and in this appeal it is s. 121(2)(c).

[58] Learned counsel for the appellant referred the court to the English courts' decisions *F Stacey and Co (Limited) v. Wallis and Others* [1912] 28 LT 209, *Penrose v. Martyr* (EB and E, 499), *Atkin and Co v. Wardle And Others* LXI LT 23, *Banque de' Indochine et de Suez SA v. Euroseas Group Finance Co Ltd* H *And Others* [1981] 3 All ER 198) where the English courts considered a similar provision to that s. 121(2)(c) in s. 63 of the British Companies Act 1908 which reads as follows:

The Companies Act 1908, provides as follows in section 63 subsection (1): - "Every limited company ... (c) shall have its name mentioned in legible I characters … in all bills of exchange, promissory notes, endorsement, cheques, and orders for money or goods purporting to be signed by or on behalf of the company,:

> Subsection (3) provided that "if any director, manager or officer of a limited company or any person on its behalf ... signs or authorises to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheques, order for money or goods ... wherein its name is not mentioned in manner aforesaid, he shall be liable to a fine not exceeding fifty pounds, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque or order for money or goods for the amount thereof unless the same is paid by the company.

[59] The English courts held that "the intention of the enactment plainly was to prevent persons from being deceived into believing that they had a security with the unlimited liability of common law when they had but the security of a company limited." (as per Justice Crompton in *Penrose v. Martyr* (EB and E, 499))

[60] Denman J in *Atkin and Co v. Wardle And Others* LXI LT 23 commenting on ss. 41 and 42 of the Companies Act 1862 (England) said as follows:

> ... the intention of the Act was to ensure extreme strictness in all transactions on behalf of limited companies as regard to the use of the registered name of the company, not only in enforcing the use of the word "limited", but in all other respects. Cases may easily be conceived in which a very slight variation for the registered name might lead a person to believe that he was taking a bill of a totally different kind of company from that to which the directors signing the bill really belonged; it may well be conceived that sect. 41 and 42 were inserted, or rather re-enacted, by the Legislature, as they were after the decision of *Penrose v. Martyr* (E.B. and E., 499) with the intention of ensuring the strictest accuracy in this respect for the protection of the public.

[61] Premised on the English authorities, it can be said that the object of s. 121(2)(c) is to ensure that the payees of cheques are not deceived into believing that the director is signing on behalf of a totally different entity from that the director signing the cheques belongs to. The question to be asked whether in the circumstances before this court was there any deception here.

[62] To recap, it is undisputed here that the appellant was never a party to the consent judgment which was between the respondent, YWP Builders Sdn Bhd and Yung Wei Pong. That consent judgment required payments from YWP Builders Sdn Bhd and not from the appellant. However the appellant being a director of YWP Builders Sdn Bhd issued four cheques to comply with the consent judgment. The crucial undisputed fact is that YWP Builders Sdn Bhd has by then changed its name to YWP Construction Sdn Bhd and the four cheques though still carried the old name of YWP Builders Sdn Bhd had the same company number which in law never changes despite of any name changes.

[63] With that same company number endorsed on the four cheques, can it be said that the respondent had been deceived or that the appellant had the intention to deceive. It is my view that the answer must be in the negative. It is undisputed that when s. 121(2)(c) was enacted in 15 April 1966, it can be said that the existence and requirement of having the company's number endorsed on the cheques was not envisaged. Applying the purposive approach in constructing statute, one must take into account of the present prevailing circumstances and then give it an interpretation which enhances the object of the Act. In the context of s. 121(2)(c), it is my interpretation that the appellant should not be held liable as there is no deception as envisaged in s. 121(2)(c).

[64] Further one must not lose sight of a basic principle of company law and that is the rule of *Foss v. Harbottle* which prescribes that a company is a separate and independent legal entity which can be sued or sue. Only by clear legislation, can this basic principle be dismantled. Hence in interpreting s. 121(2)(c), this basic principle must be given its due regard which I have done so.

Conclusion

[65] This is another case where there is no local case law on a specific provision of our Companies Act. Be that as it may, I am guided by the s. 17A of the Interpretation Acts 1948 and 1967 to give it an interpretation which not only enhances the object of s. 121(2)(c) but also reflect the time which we live in. Legislations must continue to evolve and courts have a duty in this respect provided of course it does not do damage to the words employed therein.

[66] The interpretation which I have given reflects what I said in the previous paragraph.

[67] Accordingly I find that the respondent does not have a cause of action under s. 121(2)(c) and allow the appeal with costs in the sum of RM10,000 for here and below. I also order that the orders of High Court be set aside and the deposit be refunded to the appellant.